Study Em-458 June 16, 2000

Second Supplement to Memorandum 2000-39

Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain

Attached is a letter from Richard B. Williams setting forth his personal views (not those of Caltrans) on problems involved with the draft relating to early disclosure of valuation data and resolution of issues in eminent domain. This memorandum reviews the problems Mr. Williams raises.

Use of Gov't Code § 7267.2 To Determine Amount of Litigation Expenses

Mr. Williams agrees with Mr. Nave (see First Supplement to Memorandum 2000-39) that the relocation assistance offer typically does not include an amount for goodwill, and therefore it is inappropriate to use that offer for the purpose of determining litigation expenses. He would delete the statutory provision that requires the Government Code Section 7267.2 offer to be considered in determining the amount of litigation expenses.

The staff suggests in the First Supplement to Memorandum 2000-39 that this matter be handled by Comment rather than statutory revision.

Use of Preliminary Appraisals at Trial

Mr. Williams believes that preliminary appraisals made by the condemnor in an effort to settle the case before going to trial should not be used against the condemnor at trial. He notes that "public policy is served by encouraging the condemning agency to make adequate offers to property owners and adequate deposits of probable compensation."

The Commission considered this issue at its April meeting, and concluded that the draft should not attempt to deal with the issue of admissibility of the appraisal or summary against the condemnor in the eminent domain proceeding. For the convenience of Commissioners, the discussion of this issue from the April memorandum (Memorandum 2000-24) is reproduced below.

> **Use at Trial of Appraisal under Relocation Assistance Act**
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> Should the precondemnation appraisal under the Relocation Assistance Act be given protection at trial, just as the prejudgment deposit appraisal is? Gideon Kanner believes the policy of the

prejudgment deposit statute is wrong. Protecting the appraisal does not encourage a more adequate offer, it simply fosters condemnor low-balling by making inadmissible otherwise relevant and probative evidence.

As a general matter, it has been the Commission's policy to protect the confidentiality of communications made for the purpose of attempting to settle a dispute without litigation. The Commission has recommended legislation this session, for example, to generally protect communications made during settlement negotiations against disclosure at trial. See *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*, 29 Cal. L. Revision Comm'n Reports 345 (1999).

Protection of the condemnor's prelitigation appraisal in order to encourage its adequacy would be consistent also with the purpose of the Relocation Assistance statute. See Gov't Code §§ 7267 (purpose of statute "to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts"); 7267.1 (public entity shall make every reasonable effort "to acquire expeditiously real property by negotiation").

On the other hand, the prelitigation appraisal is explicitly made admissible for the purpose of determining the amount of litigation expenses the property owner may be entitled to. "In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial." Code Civ. Proc. § 1250.410.

Moreover, the California Relocation Assistance Act codifies federally mandated property acquisition policies for projects in which federal funds are involved. The federally mandated policies do not suggest that the required appraisal should in any manner be protected from use in subsequent litigation. It is not clear whether a provision protecting the prelitigation appraisal from subsequent use against the condemnor would be deemed to violate the federal property acquisition policies.

The key policy consideration comes down to this: If we protect preliminary appraisal data from being used against the condemnor at trial, will this encourage the condemnor to be more liberal in the effort to obtain a settlement, or will it simply enable the condemnor to improperly pressure the property owner by offering a bare minimum with the threat that at trial the condemnor will be able to low-ball the property owner with impunity? The Commission needs to make a judgment on this issue.

Early Resolution of Legal Issues

The draft provides a procedure for early resolution of legal issues on pretrial motion. "The motion shall be made not later than 60 days before commencement of the trial." Proposed Code Civ. Proc. § 1260.040(a).

Mr. Williams is concerned that this would prevent a party from making motions in limine or other evidentiary motions during a 60-day blackout period before trial. "Because it may not be possible for the parties to anticipate all potential evidentiary motions before the cutoff date, I suggest that [the section] be modified to provide that its terms do not preclude evidentiary motions made at the outset of or during trial."

The concept of the 60-day motion is that it would allow sufficient time for the parties to examine valuation data that has been exchanged, give notice of motion, and conduct further discovery, and still allow time for the hearing and court decision, all before the parties must serve their final offers and demands on each other. Therefore, for purposes of the new statutory procedure, a 60-day motion is necessary.

As Mr. Williams points out, however, this could be read to suggest that other proceedings within 60 days before trial are precluded. That is not our intent, and language in the draft Comment to Section 1260.040 addresses the matter — "Nothing in this section precludes the use of other procedures for the same purpose, including, without limitation, bifurcation of issues and control of the order of proof pursuant to statute, or other pretrial procedure pursuant to court rule."

Perhaps the Comment language is not sufficient. We could elaborate the language, making clear that the other procedures may be available within 60-days before trial. Or we could elevate the Comment language to the text of the statute itself.

Alternatively, we could simply delete the 60-day limitation on the early resolution procedure. The staff does not favor this approach. The 60-day procedure, while not intended as exclusive, does provide a statutory framework that may encourage the parties to proceed diligently on the matter.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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June 13, 2000

VIA FACSIMILE AND FIRST-CLASS MAIL

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Dear Mr. Sterling:

In re: Study Em-458, Memorandum 2000-39: Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain

I am submitting this letter setting forth my personal views as a practicing eminent domain attorney for the State of California, Department of Transportation, in response to Commission Staff Memorandum 2000-39 transmitting a draft of a tentative recommendation regarding early disclosure of valuation data and resolution of legal issues in eminent domain.

As I stated in my February 8, 2000, letter to you regarding Memorandum 2000-12, and in my presentations to the Commission at the meetings held February 11 and April 13, 2000, I strongly support the concept of the early exchange of valuation data and the early resolution of legal issues in eminent domain proceedings. However, I do have the following comments and concerns regarding the present proposal:

- In his letter dated April 28, 2000, Michael R. Nave expresses his concern that offers made by condemnors pursuant to Government Code section 7267.2, which typically do not contain an offer for lost goodwill, could be used to determine the amount of litigation expenses awarded under subdivision (b) of Code of Civil Procedure section 1250.410. I share Mr. Nave's concern. My experience is that offers made under section 7267.2 do not include a sum for loss of goodwill for the reasons stated in Mr. Nave's letter. I agree that subdivision (b) should be amended by deleting the phrase "... the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code...."

- In general, the proposed amendments to Code of Civil Procedure section 1255.010 and Government Code section 7267.2 to require the condemning agency to provide additional information regarding the appraisals upon which the deposit of probable compensation and the first written offer of compensation are made are workable. However, the proposed amendments do not include language prohibiting this additional data from being used by any party at trial. As stated in the Law Revision Commission Comment to section 1255.060 of the Code of Civil Procedure, public policy is served by encouraging the condemning agency to make adequate offers to property owners and adequate deposits of probable compensation. For this reason, I strongly support amending section 1255.060 to include a prohibition on the use at trial of any portion of the data or opinions used to support the deposit of probable compensation under section 1255.010 or the first written offer under Government Code section 7267.2.

- I strongly support the addition of Code of Civil Procedure section 1260.240 to provide for the advance resolution of evidentiary and other legal issues affecting the determination of compensation. However, as presently worded, section 1260.240 would appear to prevent a party from making motions in limine or other evidentiary motions at any time after 60 days before the commencement of trial. Because it may not be possible for the parties to anticipate all potential evidentiary motions before the cutoff date, I suggest that section 1260.240 be modified to provide that its terms do not preclude evidentiary motions made at the outset of or during trial.

Subject to the comments outlined above, I believe the draft tentative recommendation attached to Memorandum 2000-39 would, if enacted, lead to more equitable and efficient resolution of eminent domain proceedings.

Very truly yours,

Richard B. Williams

RICHARD B. WILLIAMS
Attorney

cc: Michael R. Nave